EXHIBIT 63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DOCKET NO. 11 Civ.8158 (KBF)

CIRO CHARLES HICKS,

Plaintiff,

vs

VANE LINE BUNKERING, INC., and the TUG PATRIOT, In Rem,

Defendants.

DEPOSITION OF
CHARLES RIZZO, M.D.

TRANSCRIPT of the Deposition of the witness, called for Oral Examination in the above-captioned matter, said Deposition being taken pursuant to Superior Court Rules of Practice and Procedure by and before LISA ANNA RINALDI, RPR, a Notary Public and Certified Court Reporter of the State of New Jersey, at the Offices of SHORE ORTHOPAEDIC GROUP, 35 Gilbert Street South, Tinton Falls, New Jersey, on Tuesday, May 29, 2012, commencing at approximately 5:34 in the afternoon.

A P P E A R A N C E S:

HOFMANN & SCHWEITZER
Attorneys for the Plaintiff
360 West 31st Street
Suite 1506
New York, New York 10001-2727
BY: PAUL T. HOFMANN, ESQUIRE

HILL, BETTS & NASH, LLP
Attorneys for the Defendants
One World Financial Center
200 Liberty Street
26th Floor
New York, New York 10281-1003
BY: JAMES EDWARD FORDE, ESQUIRE

A L S O P R E S E N T:

James Laughlin, Video Specialist
Esquire Deposition Solutions

I N D E X

E X H I B I T S

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(Whereupon, reporter received and marked 11 Documents as exhibits Rizzo-1, Rizzo-2, Rizzo-3, Rizzo-4, Rizzo-5, Rizzo-6, Rizzo-7, Rizzo-8, Rizzo-8A, Rizzo-9, Rizzo-9A for identification.)

THE VIDEOGRAPHER: This is tape No. 1 of the videotaped deposition of Charles Rizzo, M.D., in the matter of Hicks versus Van Line Bunkering, Incorporated, et al, being heard before the United States District Court, Southern District of New York, Case No. 11 Civ.8158 (KBF.)

This deposition is being held at Shore Orthopedic Group, 35 Gilbert Street South, Tinton Falls, New Jersey on Tuesday, May 29, 2012, at approximately 5:33 p.m.

My name is James Laughlin and I am a certified video specialist. The court reporter is Lisa Rinaldi.

Counsel, will you please introduce yourselves and affiliations and the witness will be sworn.

MR. HOFMANN: Yes. Good afternoon. My name is Paul Hofmann of Hofmann & Schweitzer, and I am counsel for Mr. Charles Hicks.

MR. FORDE: My name is James Forde from the -- the law firm of Hill, Betts & Nash, counsel for Van Line Bunkering, Inc.

C H A R L E S R I Z Z O, M.D.,
having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOFMANN:

Q. Good afternoon, Doctor.

A. Hello.

Q. Would -- for the record, would you state your name and office address?

A. Sure.

My name is Charles Rizzo, and this is 35 Gilbert Street South, Tinton Falls, New Jersey.

Q. And, sir, are you a licensed physician in the State of New Jersey?

A. Yes, I am.

Q. And for how long have you been so?

A. 17 years.

Q. Could you give us a little bit of

your educational background starting with college and working your way forward?

A. Sure.

I graduated from Wagner College, Staten Island, New York with a degree in bacteriology and public health. I went on to medical school at University of Health Science/Chicago Medical School, graduated with my MD degree. Went into orthopedic residency at New York University, completed 5-year program in orthopedic surgery with a specialized year in arthroscopic sports medicine surgery at Jefferson University in Philadelphia.

Q. Philadelphia?

A. And then I joined Shore Orthopedic Group, and I have been here since, since 1996.

Q. You indicated that you have had training in the field of orthopedics; correct?

A. Correct.

Q. Could you explain to the jury what is meant by the field of orthopedics?

A. Sure.

I mean, orthopedics is the branch of medicine that deals with the musculoskeletal system, so the joints, the bones, the ligaments,

the spine. And we deal with all diseases of that area, so diseases, injuries and that -- that's the field. My particular field is in arthroscopic surgery, sports medicine.

Q. And is the -- the shoulder one of the joints that is involved in orthopedic medicine?

A. Absolutely.

Q. And do you yourself do arthroscopic surgery on shoulders?

A. Yes.

Q. And how frequently would -- do you do arthroscopic surgery on shoulders?

A. I perform surgery on Mondays and Wednesdays and normally 10 cases a week, which probably 80 on percent are shoulders.

Q. There's a specialization called "board certification in the field of orthopedics"; is that correct?

A. Correct.

Q. Could you explain what that is?

A. Sure.

Board certification is when a person completes their orthopedic residency, they can sit for a written examination. After completing and successfully passing the written

examination, you can then go into a limited practice. After certain year -- 2 years, you can take a oral examination. Upon completion and passing of the oral exam, you get your board certification. So it's two parts, a written and an oral. And then there is re-certification in orthopedics. It's every 10 years.

Q. And are you board certified, sir?

A. I am board certified and I have been re-certified. In addition to that, I have a second board certification in sports medicine.

Q. Now, you indicated you are licensed to practice in New Jersey.

Are you licensed to practice in any other states?

A. New York, I have a New York license.

Q. Now, you've -- have you been associated with providing medical treatment in the orthopedic field to any professional sports' teams?

A. Yes. When I was a fellow at Thomas Jefferson Rothman Institute, we took care of most of the professional athletes in Philadelphia, the Flyers, the Eagles, the Phillies. So I had big experience with

professional athletes.

Q. Now with a New York jury, I'm not sure if that's going to --

A. Yeah.

Q. -- get you much, but...

A. I'm still a Giant fan.

Q. Now, you have been practicing here at Shore Orthopedics for how many years?

A. Since '96.

Q. And in your practice, has my client, Ciro Charles Hicks, become a patient of yours?

A. Yes.

Q. And when for the first time was he your patient?

A. For the first time, it was an unrelated circumstance. He had fallen off a roof. I don't know exactly the same -- the date, but it was probably about ten or 12 years ago and had very severe fractures of his lower extremities, and I was -- took care of him at that time.

Q. And did you perform surgery on him?

A. Yeah. We did perform emergency surgery.

Q. And you were -- and after that --

well, did those injuries involve either of his shoulders?

A. No.

Q. And after you did the surgeries upon him and gave him treatment, was he able to return to work?

A. He did, yes.

Q. All right. And at some point, you learned that he worked in the maritime field as a tugboat captain --

A. Yes.

Q. -- is that right?

Has he consulted you with respect to a right shoulder injury he sustained back in April of 2009?

A. I did see him for that, yes.

Q. And when for the first time did you see him?

A. I can refer back to my notes. The first time that I saw him for the shoulder -- excuse me -- was August 13, 2010.

Q. Okay. In conjunction with him visiting with you with respect to his right shoulder in August of 2010, did you take a history from him as to what -- what was the

onset for the condition with his shoulder?

A. I did.

Q. And what did he describe to you?

A. He told me basically that he was working on a tugboat, and he sustained an injury lifting some heavy metal rings that they use for towing the -- the boats. He had a dislocation of his shoulder and had an injury at that time, and he had -- was diagnosed with a rotator cuff tear, had subsequent surgery for that and he was still having problems with his shoulder and he was seeking opinions, additional treatment.

Q. In conjunction with him becoming your patient, did you have the opportunity to review medical records of a prior orthopedic doctor who treated him?

A. I did.

Q. Okay. Now I'm going to show you and represent to you that this is a certified copy of the medical records of Dr. Steven Lisser.

Do you know Dr. Lisser?

A. I do.

Q. Okay. And I'm also going to show you -- and that is Exhibit 2, which you may refer to.

A. Uh-hum.

Q. I also have several other documents that we'll have you review at times, but could you -- you've had an opportunity to review Dr. Lisser's medical file; is that true?

A. That's correct.

Q. All right. For the sake of brevity, if you could just give a summary of what was relevant from the medical records that you saw from Dr. Lisser up until the point when Mr. Hicks had a surgery, and then we will go to -- we will go into detail of that.

A. Yes. I believe initially, Mr. Hicks was seen by Dr. Murphy, who's Dr. Lisser's partner.

Q. Right.

A. And he was referred to Dr. Lisser as a shoulder specialist.

Q. Okay.

A. There was an MRI that was obtained of the right shoulder. I believe there was a tear of the rotator cuff in the right shoulder, and Dr. Lisser recommended surgery to repair that tear.

Q. Okay. What were -- in general, what

were the complaints that Mr. Hicks was exhibiting and -- and presenting with -- up until that time of the surgery?

A. Shoulder pain, restricted motion, weakness, classic type symptoms that patients have with rotator cuff tears.

Q. Now, Dr. Lisser then had what's known as an MRI or an MR arthrogram performed on Mr. Hicks; is that correct?

A. That's correct.

Q. All right. I would like to show you first what we've marked as Exhibit 4, and ask -- this is a -- a set of records from Atlantic Diagnostics and contains the reports of the arthrogram of the shoulder and the MR arthrogram of the shoulder. You can take a look at that please.

And, first, if you could explain to us what is an arthrogram and then what is an MR arthrogram and what they purport to show in this case?

A. The MR -- standard MRI without the arthrogram -- all the arthrogram is, is where they inject a contrast or a dye in the shoulder that gives us better detail for the MRI --

Q. Okay.
A. -- so...
A standard MRI is a special test that we can see soft tissue. X-rays shows bones. The MRI can show tendons, ligaments and that stuff. The arthrogram is done to add some additional diagnostic capability to the MRI.
Q. Okay.
A. We routinely don't do it, but in this case, it was done. It actually makes it a much more detailed study.
Q. Okay. And what did this study reveal as for -- by the radiologist, who reported on it?
A. They usually will give you two reports. One is the radiographic or the arthrogram X-ray, and in his case it was suspicious for a tear. And what you can see is the dye leaks out; okay?
Then they did the MRI, and it shows that he had a full-thickness tear of the rotator cuff with fairly significant retraction or separation of the tendon, and they say it was two and a half to 3 centimeters. So that's a fairy -- a fair -- a fair amount of widening.

There was a partial thickness tear of the infraspinatus, which is another muscle of the rotator cuff.

Q. Okay. Anything else of significance?

A. The biceps tendon in the front of the shoulder was also subluxed or was not positioned properly.

Q. And is that indicative of anything?

A. It usually is indicative of having a tear of the rotator cuff tendon in the front of the shoulder, which is called a "subscapularis." When that tendon ruptures, it allows the biceps to kind of fall out of position.

Q. Now, Mr. Hicks had reported that he had a -- had a -- shoulder was dislocated.

Is that a -- is that a medical term or is that more of a lay -- layman's term?

A. No. A shoulder dislocation is a -- is a medical term, and it means that the ball and socket has come apart.

Q. All right. Is -- is that as a mechanism of injury? Is that -- does that correlate with the findings that -- that the MR arthrogram and the arthrogram showed?

A. Yes. In patients who are, say, 50 or

older, our main concern when they have a dislocation of their shoulder is that there is a concurrent tear of the rotator cuff. So most patients will get an MRI to determine that.

Q. Okay. You've used a lot of medical terminology about the -- the structures of the shoulder.

Do you have a model that could help explain this to the jury?

A. Sure.

Q. All right. Could you do so --

A. Sure.

Q. -- what we are talking about here?

A. This is the -- an isolated shoulder, and this has all the muscles attached, so it's good to reference for the rotator cuff muscles. And what we see is the shoulder is a ball and a socket and then all of the associated muscles around it. And here we can see --

Q. Are we looking at the front of the shoulder or the back right now?

A. This is the front of the shoulder. So here's the collarbone. This would be the right shoulder, collarbone in the front, arm here. The front portion of the rotator cuff is

this muscle here. It's -- it's a muscle and then becomes a tendon, which is like leather, really dense attachment to the bone. That's the subscapularis. That was torn on the MRI.

And then if we look at the top muscles, we have the supraspinatus muscle across the top and infraspinatus across the back and there's a small muscle associated with that, which make up the four muscles of the rotator cuff. In Mr. Hicks, he had a tear of the supraspinatus, some tearing of the infraspinatus and a tear of the subscapularis. So, really, three of the four tendons were damaged.

Q. Okay. And there was injury to the biceps tendon as well?

A. The biceps tendon is this tendon here, which goes up into the joint and is underneath the rotator cuff. So when the rotator cuff tears, this becomes also unstable.

Q. All right. Now, have you also reviewed the films that were taken at Atlantic Imaging?

A. Yes.

Q. All right. Do you have an example that you could show the jury might -- that might

show some of this damage that you --

A. Yes.

Q. -- have been talking about?

A. This is the arthrogram film that we're talking about, and you can see it's kind of a picture just in the orientation of the model. You have the -- the ball and the socket and then the -- the tendons are these muscles, tendons that come and attach in this area. And you can see as we kind of work our way down, the white material is the contrast from the arthrogram.

Q. I see.

A. And we can see that the tendon is -- the end of that tendon is sitting right about here. Normally, that tendon attaches to the bone out here; okay? So there's a retraction of the tendon, and they refer to it as two and a half to 3 centimeters. So the end of this tendon should be attached to this area.

Q. So, we shouldn't be seeing white in that area?

A. You should not be seeing white. Exactly.

Q. And how about any of the other --

A. And it --
Q. -- structures that you -- you're talking about?
A. It shows the contrast here leaking out the front of the shoulder, which is where the subscapularis is in the front.
Q. I see.
A. There are some other views which show it, but this really shows it very nicely to see the -- the full extent of the tear.
Q. Now, did -- Doctor, in your opinion, did Dr. Lisser appropriately address the tears that were found?
A. Absolutely.
Q. What did he do?
A. His surgery, he did arthroscopic surgery where the procedure was done with a scope rather than a big incision, and that's state of the art at this point --
Q. Uh-hum.
A. -- and the tendon was reattached.
The biceps, which was torn, was also addressed and the shoulder, basically, cleaned out all the partial tears and inflammation.
Q. Now I'm going to show you what we've

marked as -- first of all, that -- that film that we -- you reviewed is marked as Exhibit 8A for the record, is it not, Doctor, up there in --

A. Correct.

Q. -- the corner?

Okay. Now let me show you what we've marked as Exhibit 3 to your deposition, and this is a certified copy of the surgery records from Riverview Medical Center.

And if you could -- I'm -- I opened it up for your benefit to the operative report.

Could you explain what Dr. Lisser did in the surgery, please?

A. Yes. The procedure was arthroscopy of the right shoulder. That's basically a diagnostic where you're looking into the shoulder with the scope to see the extent of the injuries.

There was an extensive glenohumeral debridement, cleaning out debris and inflammation; a biceps tenodesis in which the biceps was anchored in place with suture anchors; arthroscopic rotator cuff repair and subacromial decompression.

Q. Yes.
A. So those are all appropriate procedures for this problem.
Q. In the -- the package, are there some of the photographs from the arthroscopy itself?
A. Yes.
Q. All right. Maybe you could show them to the -- to the jury and point out anything significant there?
A. These are the arthroscopic photographs. Actually, the -- the camera that's put in the shoulder can actually take these pictures, and these are the still shots from that. And you can see this -- this is tissue that's torn from the biceps tendon. This is more torn biceps tendon. These are pictures of the rotator cuff tear. This is rotator cuff tissue, which should be attached to that bony attachment. And then he has some very nice post-repair pictures here, which show, I think, a very satisfactory rotator cuff repair where the tendon is put back to the bone. And we can see these are blue and green sutures, which are the -- the stitches that anchor it in place.
Q. Uh-hum.

A. So at the end of the procedure, I think Dr. Lisser did a great repair in repairing that rotator cuff.

Q. Okay. Thank you. Let's put those down, put the exhibit back together and move on.

Now, we left off when we were talking about Dr. Lisser, of course, there at the surgery, but beforehand, we've talked about his office notes presurgery.

Did you also review in Exhibit 2 and -- or a copy thereof, the post-surgical recuperation and how Mr. Hicks proceeded with his recovery after the surgery?

A. Yes, I did.

Q. And could you summarize to the jury what the -- the doc -- Dr. Lisser's records reveal about how he recuperated?

A. Mr. Hicks had all the appropriate complaints of any patient after surgery. They have pain. They have stiffness, but there was a progression of that. It just seemed that he never really did get better. He constantly complained of persistent pain and weakness in his shoulder even with the physical therapy.

Q. And for how long did that -- did

those complaints to Dr. Lisser proceed?
A. Several months.
Q. And did there come a time that Dr. Lisser, from your review, started considering that he would have to maybe look back into the shoulder for further treatment?
A. I believe he did recommend an -- an MRI scan.
Q. Okay.
A. And that's -- that's standard. When the patient is not progressing as -- according to a postop plan, we have to make sure that there's not been a recurrent tear here.
Q. Now, was Dr. Lisser having Mr. Hicks undergo physical therapy?
A. He did.
Q. And is physical therapy a -- an appropriate treatment for a person with shoulder surgery?
A. Absolutely. It's very important part of the recovery.
Q. Okay. Now I'm going to refer you to -- we will jump ahead from the surgery, which it was -- what was the date of the surgery, July 1, 2009; is that correct?

A. Sounds correct.

Q. All right. I'd like you to take a look at the office notes of Dr. Lisser's office from December 9, 2009, and then I'd like you to just review them and summarize what -- what the doctor is reporting at this point, 5 months, 1 week after the surgery.

A. His range of motion was still limited with, basically, only could -- he had his arm up to 120 degrees. Normal is about 180 degrees, so that was limited.

Q. In which -- in which direction, straight --

A. Forward flexion, bringing the arm straight up over your head.

Q. Okay.

A. Okay. That's one of the major function of the rotator cuff.

It says here, "Assessment, slow progress and delay of physical therapy. Anticipate continuing physical therapy with a minimum of eight more weeks of additional straightening." Work status was modified duty. MMI, which means maximum medical improvement, was anticipated at 8 weeks. No overhead use of

his right arm with maximum lifting of 10 pounds was the restrictions.

Q. Okay. Were those reasonable restrictions at that time --

A. Yes.

Q. -- in your opinion?

A. Yes, absolutely.

Q. All right. I now would like to refer you to the next office note for Mr. Hicks from -- from the doctor, and this is dated January 15, 2010, and what do those notes reveal as to the status for Mr. Hicks?

A. His history is gradual improvement. Physical examination showed improvement to 150 degrees of motions from that last visit. Recommend continued physical therapy and assess in 6 weeks.

Q. So, at -- at that point, did he also have Mr. Hicks in a modified work status?

A. Yes.

Q. All right. Now I'd like you to again take a look at the next office note from Dr. Lisser, and that's dated March 8, 2010, and what does that show?

A. Reports residual pain in right

shoulder. It seems to be some delay in physical therapy. Physical examination revealed a painful range of motion in -- in adduction.

Q. Could you explain what ab -- is that a-b-d?

A. A-d-duction. It's --

Q. A-d-duction.

A. And which basically is a motion across the midline. Most of the time with patients, it's a-b-duction out to the side. So I'm not sure if that's correct or not.

It says, "Residual right shoulder pain. Recommend further therapy since has not completed a full therapy protocol," and continued modified duty.

Q. If you could go to the next office note for the doctor, there's -- there are physical therapy notes in between; is that correct?

A. Correct.

Q. All right. But if you'd go to the next and tell us what date it is?

A. This is date of service 4/26/2010.

Q. Okay. Could you tell us what that shows?

A. It says, "Reports persistent pain and weakness in right shoulder, which has not improved over the past several months, limiting ability to use the arm in overhead position and heavy lifting in any position." And then, physical examination shows, again, range of motion at 150 degrees; anterior tenderness, pain in the front of the shoulder with pressing there. And it says, "Assessment plan, his persistent shoulder pain and functional impairment, which have not shown further improvement over the past several months and not improved as anticipated following surgery. Recommend an MRI scan to assess healing. Return to the office after MRI scan," and, again, modified duty, work -- sedentary work.

Q. Assuming these same complaints had been presented to you, would you -- would you agree with the treatment plan of getting an MRI for a patient who was now about 8 months post-surgery?

A. Absolutely, standard of care.

Q. Okay. In fact, from your review of the records from the time of surgery until that note of April 26, 2010, had Mr. Hicks shown

significant improvement in his condition?

MR. FORDE: Objection.

THE WITNESS: Answer?

BY MR. HOFMANN:

Q. Yeah, please.

A. According, he had improvement, obviously, with range of motion, but he had continued complaints of pain and weakness, but he did improve as far as range of motion.

Q. Had he reached a -- a satisfactory result by April 26, 2010?

A. No. No. I'm sure that's why Dr. Lisser was concerned and wanted a new MRI.

Q. The next person to address and treat Mr. Hicks's right shoulder, to your knowledge, was yourself; is that right?

A. To my knowledge, yes.

Q. All right. And let me show you what I've marked as Exhibit 6, which is a combination of -- well, tell us what they are.

A. This was a evaluation medical report in which I was able to take a detailed history, review the studies and do a physical examination and to give a second opinion as to what was necessary to evaluate Mr. Hicks.

Q. Does your -- do -- does your office file -- if I may take a quick look, does your office file have these same reports or copies of these same reports?

A. There's three individual reports. There's the medical report. There's an addendum to that report reviewing an MRI and then there was another office visit that I saw Mr. Hicks.

Q. And the initial note or initial report is August 13, 2010; correct?

A. Correct.

Q. And the subsequent report is November 2, 2010?

A. Correct.

Q. And then there's an office note of February 22, 2011; correct?

A. Correct.

Q. Do you have any other typewritten records of the August 13th or the November 2, 2010, visits in your file?

A. Just these.

Q. Okay.

A. These are the actual records from the file.

Q. So these are -- so what has been

marked as Rizzo Exhibit 6 is -- is actually a -- copies of business records --

A. Correct.

Q. -- that you maintained in your file; correct?

A. Correct. Absolutely.

Q. Could you tell the -- the jury now what your exam consisted of on August 13, 2010, and what were your physical findings?

A. My examination is -- was geared mostly towards the right shoulder. He had arthroscopic portholes, which were healed. He had very limited range of motion of his shoulder with full elevation to only 110 degrees when I examined him.

There was an impingement sign, which is pain that's developed from rotator cuff irritation, inflammation or a tear. He had tenderness to palpation where it hurt over the AC joint, which is the acromioclavicular joint, which is the joint between the collarbone and the shoulder blade. It's very tender.

He had weakness when we tested his rotator cuff in abduction and external rotation strength, and he had a positive supraspinatus

test, which is a test that we're testing the supraspinatus muscle strength, which was the tendon that was a problem initially.

Q. Okay.

A. And all the nerves were functioning in the shoulder. There was no nerve deficits or vascular problems.

Q. In developing -- well, in reviewing your -- your findings on exam and the -- and the materials you reviewed, did you then reach a clinical diagnosis of what was ailing Mr. Hicks at that time in August of 2010?

A. I did, and my concern was that he had a recurrent tear of his rotator cuff.

Q. Was there anything that you at that point wished from a diagnostic standpoint to be performed in order to either confirm or disprove your assessment at that time?

A. Yes.

Q. And what was that?

A. A repeat MRI.

Q. In fact, at some point Mr. Hicks did get a repeat MRI; is that correct?

A. He did. Yes, he did.

Q. If I may, let me show you what we've

marked first as Rizzo Exhibit 7, and can you tell us what that document is?

A. This is a repeat MRI, non-contrast, without the dye, of the right shoulder. It was performed -- I believe the date --

Q. October something?

A. -- October 22, 2010.

Q. And can you explain to the jury what the report reveals, and then I'll ask you if you've reviewed the films?

A. On the report, reveals a recurrent, full thickness tear of the supraspinatus with a one and a half centimeter gap. There was still a partial tear of the subscapularis tendon. The biceps was also mentioned, but I believe that that was post-surgical findings of the position had changed from that tenodesis procedure.

Q. Okay.

A. And then he had some arthritis of the AC joint, or acromioclavicular joint.

Q. Did you review MRI films with respect to the MRI performed on October 22, 2010?

A. I did.

Q. Okay. And are those MRI films in the exhibit -- in the folder, Exhibit 9?

A. Correct.

Q. And is there one that you may be able to show us that would maybe explain what the findings were?

A. Sure.

Q. And you're referring to Exhibit 9A; is that correct?

A. Correct.

Q. All right. Here, I will take this one. Okay.

A. This is a very similar study, which we call "acromial view," and it shows, again, the ball and the socket. It shows the rotator cuff is back in essentially the same position it was on the previous study with the end of the tendon here. This shows the post-surgical position of the suture anchors, which Dr. Lisser used to hold that rotator cuff in place. We can see one here and here, but it shows a complete, recurrent tear in the rotator cuff.

Q. And as you explained, there are several muscles that constitute the rotator cuff.

If you could, again, show us with the model what the -- this MRI reveals the tears

are?

A. Sure.

Again, it's the same -- same position, same orientation. It shows a tear of the supraspinatus tendon, which is this tendon, which would normally be attached way on the lateral or the far side of the -- of the bone. It's sitting retracted on the inside almost in the joint. So this tendon here belongs attached way out there, and that's this, the larger -- largest portion of the rotator cuff is re-torn.

Q. Okay. And now, what about the subscapularis?

A. The subscapularis, again, had a partial tear. You can't see that on this film without the contrast, but the subscapularis is the tendon in the front of the shoulder, and there was a -- still a partial defect or a partial tear of that as well.

Q. Okay. In the second of the three reports that are part of Exhibit 6, did you give a review of your viewing of the MRI?

A. I did.

Q. When is the next time that you saw Mr. Hicks?

A. I saw him as -- as an office visit February 22, 2011.

Q. Could you tell the jury what Mr. Hicks's complaints were and your findings on exam?

A. Basically, the same complaints. He still had pain in his shoulder. He noticed that it was severe pain at times. He had no improvement with the surgery or with the physical therapy, and he was coming to me requesting what could be done to help him.

Q. What did you recommend be done to help him?

A. I recommended that we try to re-repair it with a second surgery.

Q. Okay. Is there a reason that you are aware of that Mr. Hicks has not had the surgery?

A. I believe --

MR. FORDE: Objection.

THE WITNESS: I believe it was, you know, due to financial issues.

BY MR. HOFMANN:

Q. He was not able to afford it?

MR. FORDE: Objection.

BY MR. HOFMANN:

Q. Is that right?
A. That was my understanding.
Q. Did you -- did you attempt to help him obtain the surgery through charitable means or something else?
MR. FORDE: Objection.
THE WITNESS: I think we did. We tried to help him with Charity Care and that sort of thing.
BY MR. HOFMANN:
Q. And was it -- were you able to obtain it for him?
MR. FORDE: Objection.
THE WITNESS: No.
BY MR. HOFMANN:
Q. Okay. Based on all the information you have reviewed, the studies, your findings on examination, your review of Dr. Lisser's records and notes, do you have an opinion within a reasonable degree of medical certainty as to what injury Mr. Hicks initially suffered in the incident on April 21, 2010?
MR. FORDE: Objection.
BY MR. HOFMANN:
Q. 2009? Excuse me.

MR. FORDE: Same objection.

THE WITNESS: I mean, it's likely that he suffered a dislocation or subluxation, some shifting and tearing of the shoulder, which resulted in a rotator cuff tear. He had what apparently was a very good surgery. The tear re-ruptured, did not heal, and he's left with a recurrent problem.

BY MR. HOFMANN:

Q. Is it surprising, though, that the -- that there was a -- to your knowledge and your experience, that there would be a re-rupture in the shoulder such as what Mr. Hicks had?

MR. FORDE: Objection.

THE WITNESS: It's not. It's not unheard of that you can have a recurrent tear, and I think most of the data studies are showing that these tears occur early on in rehab. But it's not -- it happens in my own patients, and I think what we -- we are, you know, diligent in finding out with an MRI and giving that patient a possible recurrent -- re-operation.

BY MR. HOFMANN:

Q. In -- in your opinion -- or do you have an opinion as to what -- what is the cause

of the recurrent tear that Mr. Hicks has exhibited since his surgery in July 2009?

MR. FORDE: Objection.

THE WITNESS: I don't know specifically in Mr. Hicks, but in -- in -- in most patients, those tears occur usually in physical therapy early on after surgery.

BY MR. HOFMANN:

Q. And assuming Mr. Hicks will testify or has testified by the time this is viewed, that he had no additional traumatic event post July 1, 2009, until the time you seen him or even to the present --

A. Uh-hum.

Q. -- would that shape your opinion as to what the likely cause for his recurrent tear is?

A. No.

Q. Well, would it -- would it -- would it add enough information for you to -- to be able to discount?

A. In -- in my experience, these tears can recur -- especially large tears, can recur with aggressive physical therapy where they try to obtain early range of motion and the patient

has pain in physical therapy. And it's progressive micro-tearing over the course of the physical therapy that re-tears it. There's not one event.

Q. Okay. And is it in your -- your opinion here that that is the most likely cause for the recurrence?

MR. FORDE: Objection.

THE WITNESS: Without his additional -- no history of any additional trauma, yes.

BY MR. HOFMANN:

Q. Okay. If he were to have the surgery that you've recommended, what surgery would you propose be performed?

A. I would recommend a diagnostic arthroscopy. We would look in there and see the consistency of the tissue, the configuration of the tear, and then reattempt an arthroscopic repair.

Q. Okay. Similar to what Dr. Lisser did the first time?

A. Right.

Q. All right. If the surgery was performed, what would be the recuperation period

till he reached maximum medical improvement?
A. In a revision setting, probably 6 months.
Q. And what sort of treatment would be necessary in that period?
A. Physical therapy.
Q. If you were to perform the surgery, do you know what -- what your standard charges are for doing a arthroscopic surgery repair?
A. My office charges?
Q. Yes.
A. No. There's various codes, but it's in -- it's in the range of thousands of dollars.
Q. Could you give us an estimate?
A. $5,000.
Q. And hospitalization costs, can you estimate what that would be?
A. Probably 10,000 plus.
Q. And physical therapy, what sort of physical therapy would you recommend post-surgery assuming he had it?
A. Well, we would go very slow with him post-surgical.
Q. Uh-hum.
A. I mean, so a lot of therapy, he might

even be able to do just simple range of motion for the first 6 weeks before he is into formal therapy.

Q. Uh-hum.

A. But it would probably take a minimum of four to 6 months of physical therapy afterwards.

Q. And how -- how frequently would you recommend --

A. Two to three times a week.

Q. From -- in your opinion, Doctor, has Mr. Hicks reached maximum medical improvement from the initial injury he had back in April of 2009?

MR. FORDE: Objection.

THE WITNESS: No.

BY MR. HOFMANN:

Q. And would it take that surgery and the aftercare that you've recommended for him to reach that?

A. Correct.

MR. FORDE: Objection.

BY MR. HOFMANN:

Q. Have you had the benefit of reviewing a surveillance videotape of Mr. Hicks --

A. I did.
Q. -- that was taken back in -- in or about April of 2010?
A. I did.
Q. In general, what did you -- what were the activities you saw in that surveillance that Mr. Hicks was doing?
A. He was basically walking a lot from -- you know, to his truck to his car, but there was one point that he was -- I guess his grandson or a small child was playing with a shovel and he was helping plant a shrub.
Q. Okay. And in that -- in that videotape, did you observe Mr. Hicks picking up any weight of any significance?
A. Yes. He picked up the shrub. It was a small evergreen-type shrub --
Q. Uh-hum.
A. -- and he picked it up with his left hand and then put it in the hole, and he was using the shovel with both hands --
Q. Uh-hum.
A. -- the right hand on the back of the shovel.
Q. Is there -- in -- in your

professional opinion, is there anything inconsistent in Mr. Hicks doing that physical activity with the complaints that he has presented with -- and that support your diagnosis of the recurrent tear?

A. I mean, most patients have some restrictions, mostly with overhead activity. But down with the arm at their side, they can actually perform some lifting up to 10 pounds or so, but it's really when they start getting the arm up over their head they have difficulty.

Q. Did you see anything in that videotape that showed Mr. Hicks doing overhead activities?

A. No.

Q. Was there anything in that videotape that if you were to have seen it while you were treating him, that you would say that this patient is not telling the truth about his complaints?

A. Well, it's possible. Anything is possible, but that was months after his surgery.

Q. It was in April of 2010. It was --

A. So about a year after his surgery.

Q. Right.

A. And no. I think at that point I would give him unrestricted activity. I would tell my patient, you know, at a year, you should be expected to be able to do pretty much lifting and reaching and that sort of thing.

Q. In what plains?

A. Excuse me?

Q. In what -- in which plains?

A. In all plains, if they've -- if they had a successful rotator --

Q. Right.

A. -- cuff repair.

Q. Assuming, though, in April of 2010 that Mr. Hicks had a recurrent tear.

Would there be restrictions that you would --

A. I would --

Q. -- that you would assign to him?

A. Yes. I would tell him no overhead lifting, no climbing, things over his head where he would have weakness.

Q. And getting back to the videotape of the surveillance, is there anything there that would -- that you would have said that he could not do that he was performing in that videotape?

MR. FORDE: Objection.

THE WITNESS: No. From my viewing, he did the lifting with the left arm, which was a normal arm, and he was just using the right arm to guide the shovel and do some light lifting with some topsoil.

MR. HOFMANN: Can we go off the record for 1 minute, please?

THE VIDEOGRAPHER: Off the record. The time is 6:17.

(Break in the video proceedings.)

MR. HOFMANN: Back on the record. The time is 6:17.

BY MR. HOFMANN:

Q. Doctor, I -- I want to show you what we've marked as Exhibit 5, and this is a inpatient record for Mr. Hicks for his inpatient stay of October 25, 2010, to November 5, 2010, at Riverview Medical Center.

That inpatient stay was for -- primarily for an unrelated condition; is that correct?

A. Yes. In my understanding, he had pericarditis or inflammation around the heart.

Q. When Mr. Hicks was in that hospital,

did he also have a -- an evaluation by an orthopedist of his right shoulder?

A. I believe he did.

Q. Okay. For convenience, I've put a little yellow tab. If you could just take a look at that -- that record and...

A. Orthopedic consult.

Q. All right. And -- and by whom was the orthopedic consultation?

A. Steven P. Friedel.

Q. And could you review the -- the -- Dr. Friedel's chart note and explain what -- what it reveals?

A. I mean, I guess during that hospitalization he had right shoulder pain, and Dr. Friedel is an orthopedic surgeon and basically examined that right shoulder with physical examination and came up with an impression and a plan.

Q. And what was the impression?

A. The impression was persistent right shoulder pain, and the plan was to obtain an MRI scan of his shoulder.

Q. Now, this was what date?

A. 10/28/2010.

Q. Okay. Now, this is -- is Dr. Friedel's recommendations similar to what yours were when you saw Mr. Hicks in August of 2010?

A. Yes.

Q. Dr. Friedel, do you know if he is Dr. Lisser's partner?

A. He is.

Q. Thank you, Doctor.

MR. HOFMANN: At this time, I have no further questions.

MR. FORDE: Off the record.

THE VIDEOGRAPHER: Off the record. The time is 6:20.

(Break in the video proceedings.)

THE VIDEOGRAPHER: Back on the record. The time is 6:21.

EXAMINATION BY MR. FORDE:

Q. Good evening, Doctor. My name is Jim Forde. I'm from the law firm of Hill, Betts & Nash and I -- we represent Van Line Bunkering in the case of Hicks versus Van Line Bunkering.

I'm going to be asking you a couple of follow-up questions with respect to what you

just testified to Mr. Hofmann.

A. Okay.

Q. You -- recurrent tear, you indicated that a recurrent tear can often happen in the early -- usually happens in the early -- early on during physical therapy; is that correct?

A. That's usually when we see most recurrent tears from rotator cuff -- arthroscopic rotator cuff repairs, yes.

Q. Can recurrent tears occur if the individual overexerts himself outside of physical therapy?

A. I mean, that -- I mean, usually, pain is a guide during that early postoperative phase. So patients really can't do that. It's really when the therapist are manipulating their arm for range of motion that we see a lot of these things occur.

Q. But if you -- is it possible that a recurrent tear can happen because of a subsequent trauma of some sort?

A. Oh, yes, absolutely. Sure.

Q. And if assuming -- if assuming Mr. Hicks had been doing overhead work or lifting his child over his -- his grandchild

over his head, could that possibly cause a recurrent tear?

A. It can.

Q. And if -- does the chances of -- of having a recurrent tear outside of physical therapy increase if the patient stops going to physical therapy?

A. No. By stopping physical therapy won't cause a recurrent tear. What the complication that we would see would be additional scar tissue and loss of motion.

Q. Okay. And did -- did you find whether Mr. Brown had a loss of --

MR. HOFMANN: Hicks.

MR. FORDE: Sorry. Mr. Hicks. Wrong case.

BY MR. FORDE:

Q. -- Mr. Hicks had a restricted range of motion?

A. He did. When I saw him, he had restricted range of motion.

Q. So that could also be as result of not going to physical therapy?

A. It could be. Usually, it's restricted from scar tissue formation. So even

in the best physical therapy, patients can get scar formation that limits their range of motion.

Q. And you indicated earlier that you know Dr. Lisser; is that correct?

A. I do.

Q. And do you find him to be a competent orthopedic surgeon?

A. Absolutely.

Q. And --

MR. FORDE: Can we mark this as the next exhibit?

COURT REPORTER: Sure.

(Discussion off the record.)

(Whereupon, reporter received and marked a 3-Page Document as Exhibit 10 for identification.)

BY MR. FORDE:

Q. I'm going to show you what has been previously marked as Dr. Rizzo -- Rizzo-10. I want to ask if you've seen this document before.

A. I believe this is part of Dr. Lisser's records, yes. I have them in the chart.

Q. And do you recall reviewing his

recommendations in the back there?

A. His last recommendation where it says "plan, based on the materials I have referenced, I" -- "no additional treatment for the right shoulder injury is recommended. Based upon these materials, it is my opinion that the patient should have adequate function of his right shoulder to perform work activities as described in his job description and active at his full work duty."

Q. And do you agree with that opinion?

A. No.

Q. Okay. Now, with respect to -- I am sorry. Where is 10?

Now, within this report of Dr. Lisser he indicated that he had reviewed with Mr. Hicks that physical therapy visits had been authorized, contrary to his statements.

Did you -- were you aware that Mr. Hicks was consistently missing his physical therapy sessions?

MR. HOFMANN: Objection.

THE WITNESS: No. I wasn't aware of it, it was a routine occurrence, no.

BY MR. FORDE:

Q. Okay. If -- and if Mr. Brown -- excuse me. If Mr. Hicks was consistently missing -- assuming that Mr. Hicks was consistently missing his physical therapy sessions, you indicated -- well, he would have restricted motion of his right shoulder; is that correct?

A. I'm not aware that he missed the bulk of his physical therapy. If he missed an occasional session, I don't think overall it would have a major effect. But if a patient didn't have any physical therapy for their shoulder, it would be a high likelihood that they would have scar tissue formation and restricted motion.

MR. FORDE: Thank you. I have nothing further.

THE WITNESS: You're welcome.

EXAMINATION BY MR. HOFMANN:

Q. Doctor, just very quick follow up.

You indicated that you disagreed with Dr. Lisser's recommendation that Mr. -- or opinion that Mr. Hicks, as of June 8, 2010, had adequate function with his right shoulder to

perform his work activities in his described job description; is that correct?

A. That's what the report says, yes.

Q. Yeah. But you disagree with that?

A. I -- based on the second MRI and that he had a recurrent rotator cuff tear, my opinion would be that he would have difficulty doing that type of job that he was doing before, heavy lifting, climbing.

Q. Such as climbing ladders?

A. Yes.

Q. Climbing up barges?

A. Correct.

Q. Lifting -- assuming lifting a 200-pound doughnut on a bar, even with assistance of another person?

A. Sure.

MR. FORDE: Objection.

MR. HOFMANN: Thank you, Doctor. Nothing further.

THE WITNESS: You are welcome.

MR. FORDE: We can't help ourselves. I got nothing further.

THE VIDEOGRAPHER: This concludes today's videotaped deposition of Charles Rizzo,

M.D., going off the record. The time is 6:30.

(Whereupon, the videotaped deposition of CHARLES RIZZO, M.D. concluded at 6:31 p.m.)

C E R T I F I C A T E

I, LISA ANNA RINALDI, RPR, and a Certified Court Reporter and Notary Public of the State of New Jersey, do hereby certify that prior to the commencement of the examination, the witness was duly sworn by me to testify the truth, the whole truth and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither of counsel nor attorney for any party in this action, and that I am not interested in the event nor outcome of this litigation.

LISA ANNA RINALDI, C.C.R., R.P.R.
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Notary Public of the State of New Jersey